FOR ARGUMENT

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 28 2017
OFFICE OF THE CLERK

No. 16-499

In the Supreme Court of the United States

JOSEPH JESNER ET AL., PETITIONERS

v.

ARAB BANK, PLC, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE OF INTERNATIONAL BANKERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The Institute of International Bankers (the "IIB") is the only national association devoted exclusively to representing and advancing the interests of banking organizations headquartered outside the United States that operate in the United States.[1] The IIB's membership consists of internationally headquartered banking and financial institutions from over 35 countries. In the aggregate, IIB members' U.S. operations have approximately $5 trillion in assets, provide approximately 27% of all commercial and industrial bank loans made in this country, and contribute more than $50 billion each year to the U.S. economy. As part of its mission, the IIB seeks to ensure that the global operations of its member institutions are not subject to unwarranted extraterritorial application of U.S. laws. The IIB regularly appears before federal courts as *amicus curiae* in cases that raise significant legal issues related to banking.

The parties' briefs in this case adequately address the question presented by the petition for a writ of *certiorari*: whether the Alien Torts Statute ("ATS"), 28 U.S.C. § 1350, permits corporate liability. Resolving that question alone, however, will have

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[1] Under Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than *amicus*, its members, or its counsel contributed any money to fund the brief's preparation or submission. The parties have consented to the filing of *amicus curiae* briefs in support of either party.

little practical impact on the resolution of most ATS actions. Even if Petitioners were to prevail on the issue of corporate liability, a circuit split will continue to exist concerning what domestic conduct has "sufficient force" to displace the presumption against extraterritoriality in ATS cases. *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) ("*Kiobel II*").

This case is a prime example of the need for clarification: foreign plaintiffs are suing a foreign defendant over links to a foreign third party that engaged in foreign conduct causing a foreign injury. The sole domestic hook on which Petitioners seek to rely is that certain payments made abroad to foreign recipients were incidentally cleared through a branch of Respondent in the United States, because those payments, or intermediate payments, were denominated in U.S. dollars.[2]

The IIB submits this brief to provide the Court with information on the nature of U.S. dollar-clearing operations, and to solicit the Court's guidance on what type of conduct lower courts may consider under the extraterritoriality analysis of *Kiobel II*—an issue that is dividing the courts of appeals—and, in particular, whether the act of dollar clearing, standing alone, is sufficient to displace the presumption. In the IIB's view, this Court's precedent is unambiguous—application of the ATS is proper only if there is

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[2] Although Petitioners allege that certain payments were made in U.S. dollars, *see, e.g.*, Court of Appeals Appendix ("C.A. App.") A247. they also allege that, for some unspecified number of transactions, the U.S. dollar was nothing more than an intermediary currency, used "to convert Saudi currency into Israeli currency," Pet. App. 39a; *see, e.g.*, C.A. App. A246.

domestic conduct that falls within the "focus" of the ATS—*i.e.*, domestic conduct that violates the law of nations. Under that proper framework, the outcome of this case should be clear: because all relevant conduct that allegedly violated the law of nations occurred abroad, and only the incidental and mechanistic clearing of dollars occurred in the United States, there is no basis for an ATS suit, and Petitioners' claims are foreclosed irrespective of the Court's resolution of the question presented.

SUMMARY OF ARGUMENT

As Judge Jacobs of the Second Circuit wrote in concurring with that court's denial of *en banc* review in this case, the question of corporate liability under the ATS is largely of only academic interest. Pet. App. 37a. Since this Court decided *Kiobel II*, almost every other case brought under the ATS has ultimately turned on whether the claims "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Kiobel II*, 133 S. Ct. at 1669. Because this extraterritoriality question is inevitable in almost every ATS case, and a well-developed circuit split already exists on this issue, this Court's elucidation of the *Kiobel II* standard is warranted here.

In this case, Petitioners allege that they were victims of heinous crimes abroad. The IIB deplores all acts of terrorism and does not seek to rationalize, excuse or enable perpetrators to escape responsibility for horrific acts of violence. The grave nature of the allegations, however, cannot be the basis to set aside critical and well-established limits on the reach of U.S. law abroad. All the relevant conduct at issue in

this case occurred far from American shores: a foreign bank provided banking services overseas to foreign individuals and organizations with some alleged relationship to other foreign parties who directly injured foreign plaintiffs on foreign soil. The only possible connection between this foreign activity and the United States is that Respondent Arab Bank, PLC—like virtually every international bank—cleared U.S. dollar-denominated payments, or intermediate payments, through New York.

Given Petitioners' claims, that type of routine and incidental conduct involving the U.S. banking system plainly does not "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application" of the ATS. *Kiobel II*, 133 S. Ct. at 1669. Under this Court's clear language, there is a high bar—a "presumption"—that can be overcome only by conduct of "sufficient force." *Id.* Clearing foreign dollar payments through the United States, without more, falls well short of satisfying this test, as it is a routine and mechanistic aspect of the international financial system. Over $1.5 trillion in such payments are cleared through New York *every day*. If clearing dollar payments through the United States were a sufficient basis for liability under the ATS, the presumption against extraterritoriality would be rendered effectively meaningless in this and numerous other cases, and foreign banks could be made to answer in U.S. courts for all manner of foreign disputes.

Such a rule would expand the ATS well beyond its narrow intended scope—domestic conduct that violates the law of nations. The statute is aimed at defendants who commit "a handful of heinous

actions—each of which violates definable, universal and obligatory norms." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quoting *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)); *cf. Balintulo* v. *Daimler AG*, 727 F.3d 174, 180 n.2 (2d Cir. 2013) ("The wrongs condemned by customary international law include those heinous criminal offenses that fall under the general headings of war crimes and crimes against humanity."). But the only domestic conduct alleged here—Respondent's dollar-clearing activities in the United States—comes nowhere close to meeting the threshold set in *Sosa*. Petitioners' approach to defeating the presumption against extraterritorial application of the ATS thus would untether the ATS from its traditional moorings: the statute is not meant to provide an open-ended cause of action against foreign banks for banking services provided abroad that entail incidental dollar-clearing activities in the United States.

Expanding the scope of the ATS in this manner would also upset the legal regime that U.S. and foreign regulators have established for international payments processed by global financial institutions. Under Petitioners' approach, it would not matter whether foreign banks fully comply with all governing regulations, including regulations issued by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") that prohibit the provision of services to designated foreign terrorist organizations. Foreign banks nevertheless could be subject to liability under the ATS whenever their provision of banking services abroad involved a dollar-denominated payment that they cleared in the United States. ATS lawsuits that expand upon an internationally agreed-upon and understood

regulatory framework obviously conflict with the regime established by Congress, and they would be a breeding ground for international discord by unnecessarily projecting U.S. law abroad. All of these thorny legal and political issues could have been avoided had Petitioners brought suit in a jurisdiction with a real and substantial interest in the litigation—for example, in Israel, where they reside and were injured. Petitioners' decision to instead sue halfway across the world in a jurisdiction only tangentially connected to their claims—by their own admission, in order to seek punitive damages not available elsewhere—is no reason to ignore the important limits on extraterritorial application of U.S. laws.

ARGUMENT

I. Regardless of How the Question Presented Is Resolved, Lower Courts Would Benefit from the Court's Guidance on What Conduct Is of "Sufficient Force" to Displace the Presumption Against Extraterritoriality.

This Court was poised to consider the question presented here—corporate liability under the ATS—when it granted *certiorari* to review the Second Circuit's decision in *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*"). Ultimately, however, this Court, elected to dispose of that case without deciding that question by holding that the ATS does not have extraterritorial application. *Kiobel II*, 133 S. Ct. at 1669. In *Kiobel II*, this Court explained that ATS claims can proceed only if they "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.* That standard was not satisfied in *Kiobel II* because

"all the relevant conduct took place outside the United States." *Id.* Although the corporate defendants did business in the United States, the Court dismissed that as an inadequate basis for suit: "Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Id.*

Since *Kiobel II* was decided, the issue of corporate liability under the ATS "has been largely overtaken, and its importance for outcomes has been sharply eroded." Pet. App. 37a (Jacobs, J., concurring in denial of reh'g *en banc*); *see id.* 42a-43a (surveying cases). This is not to say that the question of corporate liability can never have an impact—the Second Circuit itself decided a case last year by holding that the plaintiffs there would have satisfied *Kiobel II*, but that their claims nonetheless were foreclosed because the defendant was a corporation. *Licci* v. *Lebanese Canadian Bank, SAL*, 834 F.3d 201, 219-220 (2d Cir. 2016), *pet. for cert. pending* No. 16-788.[3] Even if there is corporate liability under the ATS, however, the question of extraterritoriality will almost inevitably follow in any ATS case. Given the central importance of the extraterritoriality question, the resolution of this case will have little practical impact on the multitude of ATS cases unless there is clear guidance on extraterritoriality.

Post-*Kiobel II* jurisprudence shows that further guidance from this Court is warranted to explain what type of conduct is of "sufficient force" to displace the presumption against extraterritoriality in ATS cases.

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[3] However, as discussed *infra* pp. 20-22, the *Licci* panel's extraterritoriality analysis cannot be squared with *Kiobel II*.

See Adhikari v. *Kellogg Brown & Root, Inc.*, 845 F.3d 184, 194 (5th Cir. 2017) (noting that "circuits have offered differing interpretations of *Kiobel*'s 'touch and concern' language").[4] On one side of the circuit split, the Second and Fifth Circuits faithfully follow this Court's clear precedent, which requires courts to "examin[e] the conduct alleged to constitute violations of the law of nations, and the location of that conduct." *Id.* (quoting *Mastafa* v. *Chevron Corp.*, 770 F.3d 170, 185 (2d Cir. 2014)); *see RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2101 (2016). This framework is grounded in this Court's instruction to look to the territorial "focus" of the statute. *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010). Under this approach, an ATS claim must be dismissed if "all the relevant conduct that purportedly violated the law of nations . . . is alleged to have occurred on the territory of a foreign sovereign." *Balintulo*, 727 F.3d at 191; *see Kiobel II*, 133 S. Ct. at 1670 (Alito, J., concurring) ("[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will

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[4] In the past three years, at least six petitions for a writ of *certiorari* have been filed seeking clarification of what domestic conduct is of "sufficient force" to displace the presumption against extraterritoriality. *See* Petition for Writ of Certiorari, *Ntsebeza* v. *Ford Motor Co.*, 136 S. Ct. 2485 (2016) (No. 15-1020); Petition for Writ of Certiorari, *Doe* v. *Drummond Co.*, 136 S. Ct. 1168 (2016) (No. 15-707); Petition for a Writ of Certiorari, *Nestle U.S.A., Inc.* v. *Doe*, 136 S. Ct. 798 (2016) (No. 15-349); Petition for a Writ of Certiorari, *Mujica* v. *Occidental Petroleum Corp.*, 136 S. Ct. 690 (2015) (No. 15-283); Petition for Writ of Certiorari, *Baloco* v. *Drummond Co.*, 136 S. Ct. 410 (2015) (No. 15-263); Petition for a Writ of Certiorari, *Cardona* v. *Chiquita Brands Int'l, Inc.*, 135 S. Ct. 1842 (2015) (No. 14-777).

therefore be barred—unless the *domestic* conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations." (emphasis added)).

On the other side of the split, the Ninth Circuit has interpreted *Kiobel II* as casting aside *Morrison*'s "focus" mandate as inapplicable to ATS cases. *See Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) ("*Kiobel II* did not explicitly adopt *Morrison*'s focus test, and chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard it did adopt."). The Ninth Circuit instead instructs courts to consider a multitude of factors, including the defendant's U.S. citizenship. *See Mujica* v. *AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014). Similarly, the Fourth Circuit has eschewed *Morrison* in ATS cases in favor of a wide-ranging "fact-based analysis" that requires courts to "consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action." *Al Shimari* v. *CACI Premier Tech., Inc.*, 758 F.3d 516, 527 (4th Cir. 2014).

Presenting still another view, the Eleventh Circuit "amalgamates *Kiobel*'s standards with *Morrison*'s focus test, considering whether 'the claim' and 'relevant conduct' are sufficiently 'focused' in the United States to warrant displacement and permit jurisdiction." *Doe* v. *Drummond Co.*, 782 F.3d 576, 590 (11th Cir. 2015). This inquiry also considers a defendant's U.S. citizenship, as well as the potential national interest in allowing the case to proceed. *Id.*

Even following this Court's recent decision in *RJR Nabisco*, 136 S. Ct. at 2101, which clarified the appropriate "framework for analyzing

extraterritoriality issues" under both *Morrison* and *Kiobel II*, *id.*, courts remain divided on whether *Kiobel II* mandates an ATS-specific extraterritoriality analysis that is distinct from *Morrison*. *Compare Salim* v. *Mitchell*, 2017 WL 3389011, at *14 (E.D. Wash. Aug. 7, 2017) (adhering to view that "*Kiobel II* did not incorporate *Morrison*'s focus test") *with Nestle* v. *Nestle, S.A.*, No. 2:05-cv-05133-SVW-MRW, ECF No. 249 at 2 (C.D. Cal. Mar. 2. 2017) (holding that Ninth Circuit's "conclusion that the *Morrison* focus test did not apply to ATS claims is in irreconcilable conflict with" *RJR Nabisco*).

Given this well-developed circuit split, the Court should take this opportunity to clarify that there is only one "framework for analyzing extraterritoriality issues," *RJR Nabisco*, 136 S. Ct. at 2101, which applies to ATS cases just as it applies to all others. Although *Kiobel II* phrased the test somewhat differently from *Morrison*, *RJR Nabisco* confirms that they amount to the same result. Under this one framework, "if the conduct relevant to the focus" of the statute—here, the conduct that allegedly violated the law of nations—"occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*[5] It is not sufficient that *some* conduct occurred in the United States or, indeed, even that "significant and material conduct" in furtherance of the alleged violation of the

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[5] *See* Note, *Clarifying Kiobel's 'Touch and Concern' Test*, 130 HARV. L. REV. 1902, 1911 (2017) (arguing that "the ATS should not provide jurisdiction unless the wrongful conduct that occurred in the United States is itself a tort committed in violation of the law of nations") (internal quotation marks and alteration omitted).

law of nations took place here. *Morrison*, 561 U.S. at 270.

Applied to this case, it is clear that the only domestic conduct alleged—routine dollar-clearing operations—cannot support ATS jurisdiction.

II. The Routine Clearing of Foreign Payments Through the United States Alone Cannot Serve as a Basis for ATS Actions.

A. Substantially all wholesale foreign U.S. dollar-denominated payments in the world are cleared through the United States as a matter of course.

The Clearing House Interbank Payments System ("CHIPS") is an interbank system that transmits and settles orders in U.S. dollars for many of the largest U.S. and foreign banks. CHIPS is the preferred payments system for wholesale international dollar transactions.[6] In such situations, the foreign payor's foreign bank typically sends a SWIFT[7] message to a

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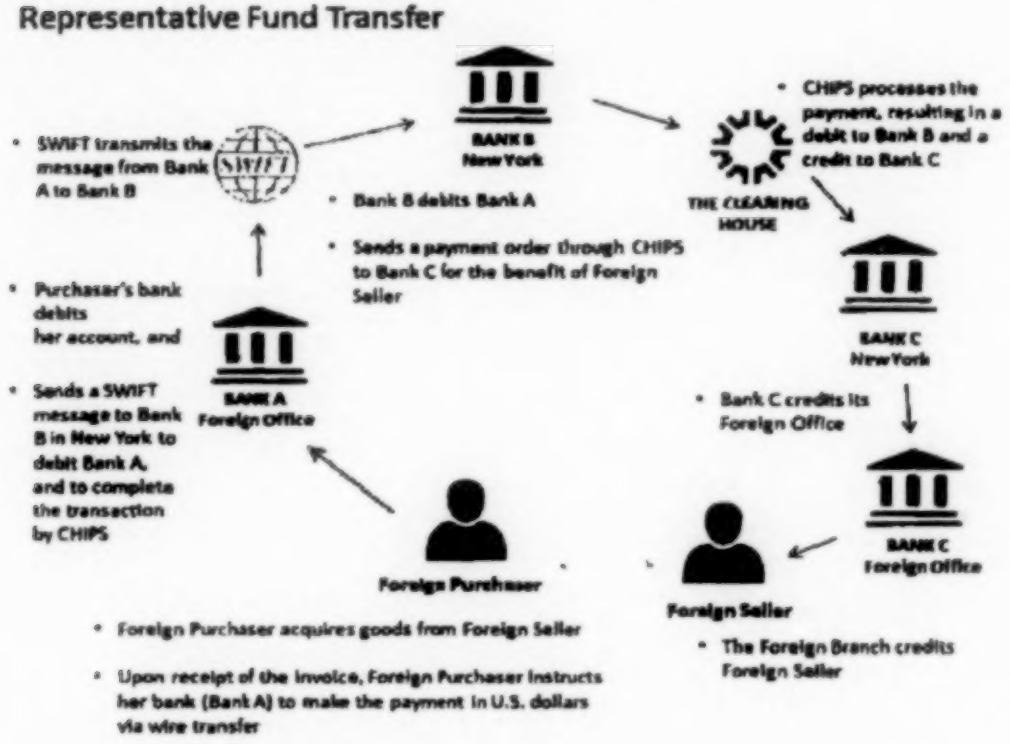
[6] The other major clearing system is Fedwire, operated by the Federal Reserve. "Of the two, CHIPS is more frequently used for international transactions." *Exp.-Imp. Bank of U.S.* v. *Asia Pulp & Paper Co., Ltd.*, 609 F.3d 111, 119 n.7 (2d Cir. 2010). For present purposes, it does not matter whether dollar-clearing operations in the United States occur through CHIPS, Fedwire, or some other system.

[7] The Society for Worldwide Interbank Financial Telecommunications ("SWIFT") is group of over 10,000 financial institutions worldwide. The group uses a private encrypted wire transfer message system to transmit foreign exchange confirmations, debit and credit entry confirmations, and other financial transactions. SWIFT, *Discover SWIFT*, available at: https://www.swift.com/about-us/discover-swift?AKredir=true (last visited Aug. 27, 2017).

CHIPS participating bank (often, but not necessarily, the foreign bank's New York branch or subsidiary bank), which in turn sends a payment order through CHIPS to the U.S. operations of another bank for the benefit of the foreign payee. That other bank then credits the foreign payee's foreign bank, which in turn credits the payee's foreign account. The following diagram illustrates a representative fund transfer between two foreign parties using CHIPS:


Representative Fund Transfer
BANK B
New York
• CHIPS processes the payment, resulting in a debit to Bank B and a credit to Bank C
• SWIFT transmits the message from Bank A to Bank B
SWIFT
THE CLEARING HOUSE
• Bank B debits Bank A
• Sends a payment order through CHIPS to Bank C for the benefit of Foreign Seller
BANK C
New York
• Purchaser's bank debits her account, and
• Sends a SWIFT message to Bank B in New York to debit Bank A, and to complete the transaction by CHIPS
BANK A
Foreign Office
• Bank C credits its Foreign Office
BANK C
Foreign Office
Foreign Purchaser
Foreign Seller
• Foreign Purchaser acquires goods from Foreign Seller
• Upon receipt of the invoice, Foreign Purchaser instructs her bank (Bank A) to make the payment in U.S. dollars via wire transfer
• The Foreign Branch credits Foreign Seller

Those types of foreign fund transfers are what is at issue in this case.[8] In the ordinary course of its

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[8] Foreign transactions may involve payments that need to be cleared through the United States even when the transactions themselves are not denominated in dollars. For example, if foreign parties wish to exchange currencies that are not easily convertible into one another, the U.S. dollar is often used as an intermediary

business, Respondent's New York branch provided dollar-clearing services to Respondent's non-U.S. branches, as well as to other foreign banks. *See* C.A. App. A197-A198. As a CHIPS participant, the New York branch both sent and received payment orders as part of dollar-denominated fund transfers, including transfers that originated or terminated overseas.[9] Petitioners contend that certain overseas account holders at Respondent sent or received dollar payments and that, when they did so, the payments were cleared through Respondent's New York branch using CHIPS. *See* Pet. Br. 5, 8; C.A. App. A204, A209, A245-246.

To be clear, the payment messages were originated by a bank outside the United States and received by a bank outside the United States, and both the payor and recipient were outside this country. Moreover, the payment messages were transmitted by an organization outside the United States. *See generally* C.A. App. A244-253. The United States was involved solely because the payment was denominated in U.S. dollars—or the U.S. dollar was used as an intermediary currency for the purposes of the

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currency to facilitate the exchange, and the exchange then would be cleared through the United States. That is alleged to have occurred here. Pet App. 39a. Also, if a foreign buyer purchases a good in a foreign currency but wishes to finance the transaction from its U.S. dollar account, the transaction would involve U.S. dollars, and the corresponding payment would be cleared through the United States.

[9] Respondent's New York branch was a CHIPS participant during the time period at issue in this case. Banks that are not CHIPS participants access the system by routing payment orders through an intermediary institution that is a CHIPS participant.

currency exchange—and such transactions are predominantly cleared in the United States. But such clearance activity is an entirely mechanical function; it occurs without human intervention in the proverbial "blink of an eye." The acts of terrorism described in this case occurred solely outside the United States.

The clearing of foreign dollar payments through the United States is not merely commonplace among international financial institutions—it is ubiquitous. Almost "[a]ll wholesale international transactions involving the use of the dollar go through CHIPS." *Mashreqbank PSC* v. *Ahmed Hamad Al Gosaibi & Bros. Co.*, 12 N.E.3d 456, 460 (N.Y. 2014). On an average day, CHIPS clears more than 440,000 payments collectively worth over $1.5 trillion. *See* CHIPS, *Annual Statistics From 1970 to 2017*, available at https://www.theclearinghouse.org/-/media/tch/pay%20co/chips/reports%20and%20guides/chips%20volume%20through%20july%202017.pdf?la=en (last visited Aug. 27, 2017). Simply put, clearing those payments through New York is a routine and universal aspect of the international financial system.

B. Clearing payments through the United States bears no cognizable connection to the foreign tortious conduct at issue in this case.

Plaintiffs' claims in *Kiobel II* were dismissed because "all the relevant conduct took place outside the United States." *Kiobel II*, 133 S. Ct. at 1669. By the same logic, Petitioners' claims here fail as well because they do not "touch and concern" the United States "with sufficient force" to permit application of the ATS. *Id.* Petitioners acknowledge that Respondent is a foreign corporation domiciled in the Kingdom of Jordan and that the transactions at

issue—deposits in foreign accounts subsequently wired to other foreign accounts—occurred overseas among foreign parties. The only nexus to the United States is that, as an incident to providing banking services abroad, Respondent cleared certain dollar payments through its New York branch. That connection is no more substantial than the type of domestic conduct this Court deemed inadequate in *Kiobel II*—*i.e.*, simply maintaining a corporate presence in the United States. Foreign banks clear substantially all foreign dollar payments through New York, and thus "it would reach too far to say that mere [clearing of a foreign transaction] suffices." *Kiobel II*, 133 S. Ct. at 1669.[10]

Put another way, the clearing of foreign payments through the United States is a routine and entirely ministerial part of conducting dollar-denominated transactions abroad. Literally trillions of dollars in foreign payments are cleared through New York every week. When a foreign account holder wishes to send or receive payments in dollars, financial institutions need a way to move funds between accounts, and systems like CHIPS or Fedwire provide a reliable way to transfer those funds. But the mechanism for transfer has nothing to do with the substance of the transactions themselves, much less the underlying conduct that prompted the financial transactions. The fact that any funds make their way through the United States is purely incidental to the

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[10] *See* Pet. App. 40a (Jacobs, J., concurring in the denial of reh'g *en banc*) (stating on behalf of four Second Circuit judges that this case "could [be] straightforwardly decided under *Kiobel II*").

fact that the transaction is in whole or in part denominated in U.S. dollars.

Taking this case as an example, it is immaterial that the transactions at issue were cleared through Respondent's own New York branch; they could have been cleared through any bank that participates in CHIPS. And if the payments had been cleared through any one of the many other banks that participate in CHIPS, Petitioners could not plausibly have suggested that the clearing bank could be sued under the ATS.[11] That underscores the lack of any meaningful connection between the clearing operations and the substance of the foreign transactions.

Indeed, courts have declined to permit ATS actions on the basis of domestic conduct that is arguably more substantial than the clearing operations at issue here. *See, e.g.*, *Adhikari*, 845 F.3d at 198 (dismissing ATS action where defendants allegedly "transferred payments to [co-conspirator] from the United States, using New York Banks"); *Cardona* v. *Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1192 (11th Cir. 2014) (dismissing ATS claim where defendants allegedly executed "a scheme of payments . . . to Colombian terrorist organizations . . . all from their corporate offices in the territory of the United States"); *Tymoshenko* v. *Firtash*, 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013) (dismissing ATS action even though defendant maintained U.S. bank accounts).

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[11] As Respondent notes, many transactions were in fact cleared through other major U.S. financial institutions, none of which are (or could be) a defendant here. Resp. Br. 10 n.2.

The facts of this case would not pass muster even under Justice Breyer's concurring opinion in *Kiobel II*, which offered a more permissive view of extraterritoriality. Justice Breyer observed: "The plaintiffs are not United States nationals but nationals of other nations. The conduct at issue took place abroad. And the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so." *Kiobel II*, 130 S. Ct. at 1678 (Breyer, J., concurring). Here too, Petitioners are not U.S. nationals, the conduct at issue (both the underlying terrorist acts and the subsequent payments) took place abroad, and Respondent is not alleged to have engaged in any of the conduct at issue, but at most to have cleared payments for entities that were *not* designated by the United States as terrorist organizations.[12] Indeed, Respondent's domestic conduct here is even more removed from the underlying acts than the defendant's conduct in a recent decision applying Justice Breyer's approach. *See Sexual Minorities Uganda* v. *Lively*, 2017 WL 2435285, at *6 (D. Mass. Jun. 5, 2017) (finding insufficient under *Kiobel II* "sporadic emails sent by Defendant from the United States offering encouragement, guidance, and advice to a cohort of Ugandans prosecuting a campaign of repression against the LGBTI community in their country").

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[12] *See* Resp. Br. 11 & n.3.

C. Allowing ATS actions on the basis of routine clearing operations would render the presumption against extraterritoriality meaningless in this context.

Given the routine nature of clearing operations in the United States, allowing suits under the ATS on that basis would mean that foreign banks could be made to answer in this country's courts for all manner of foreign disputes. *See Kiobel II*, 133 S. Ct. at 1670 (Alito, J., concurring) ("[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." (quoting *Morrison*, 561 U.S. at 266)). In essence, Petitioners' approach would stand the presumption on its head: there would be a presumption *in favor of* extraterritorial application whenever a plaintiff alleged U.S. dollar payments through a financial institution, because those payments almost inevitably would be cleared through the United States.

Such a result would completely ignore "the practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 722-723. International financial institutions are frequently the target of ATS actions. As of 2011, "[a]pproximately 15 percent [of all ATS suits] have been filed against the financial services industry, most of which were directed against banks." Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 461 (2011). Those actions are sure to multiply if a bank's routine clearing of dollar payments through New York may serve as a sufficient basis for suit. Without meaningful jurisdictional constraints,

internationally active banks will be forced to absorb the substantial costs of defending against ATS suits for their actions that are at most tangential to foreign tortious conduct. *See* Gary C. Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT'L ECON L. 245, 252-53 (2004) (describing "massive costs" associated with ATS lawsuits).

Moreover, throwing open the doors of federal courts in that way would run directly counter to the type of "judicial caution" that is necessary in interpreting the ATS. *Sosa*, 542 U.S. at 725. Instead of being restricted to "a relatively modest set of actions," *id.* at 720, Petitioners' approach to extraterritorial application would invite waves of litigation with only attenuated connections to this country. *See Ali Shafi* v. *Palestinian Auth.*, 642 F.3d 1088, 1094 (D.C. Cir. 2011) ("[T]he proposition advanced by the appellants . . . could open the doors of the federal courts to claims against nonstate actors anywhere in the world alleged to have cruelly treated any alien. To recognize such a sweeping claim would hardly be consistent with the standards of caution mandated by the *Sosa* Court."); *cf. Taveras* v. *Taveraz*, 477 F.3d 767, 782 (6th Cir. 2007) (declining to extend ATS to child abduction claims because it "would open the floodgates to a mass of custody-related disputes by aliens").

For essentially that reason, the New York Court of Appeals, in an analogous context, held that a bank's clearing of foreign dollar payments through New York is not a sufficient basis to maintain suit in the United States. *See Mashreqbank*, 12 N.E.3d at 460. In that case, a Dubai bank agreed with a Saudi company to exchange U.S. dollars for Saudi riyals.

When the dollars were delivered but the riyals were not, the bank sued in New York state court. The New York Court of Appeals ultimately dismissed the action on *forum non conveniens* grounds, holding that New York has no real interest "every time one foreign national . . . moves dollars through a bank in New York." *Id.* New York's banking system, the court reasoned, is not "a trump to be played whenever a party to such a transaction seeks to use our courts for a lawsuit with little or no apparent contact with New York." *Id.* (quoting *First Union Nat Bank* v. *Paribas*, 135 F. Supp. 2d 443, 453 (S.D.N.Y. 2001)).

The New York Court of Appeals' analysis applies with equal force to the ATS. Claims that involve foreign conduct should not proceed in U.S. courts simply because a "foreign national" has "move[d] dollars through a bank in New York." *Id.*[13]

The Second Circuit's recent opinion in *Licci*, cited in Petitioner's petition for a writ of *certiorari*, *see* Pet. 24, does not require a contrary result, but it does illustrate the confusion and inconsistency that will remain in the courts below until this Court provides additional clarity. In *Licci*, foreign plaintiffs alleged that a foreign defendant, Lebanese-Canadian Bank

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[13] *See also Norex Petroleum Ltd.* v. *Blavatnik*, 151 A.D.3d 647 (N.Y. App. Div. 2017) (dismissing claims where "[t]he key events underlying the claim took place in Russia," even where "individual defendants may have wired funds from New York"); *Bluewaters Commc'ns Holdings, LLC* v. *Ecclestone*, 122 A.D.3d 426, 428 (N.Y. App. Div. 2014) (holding that case "lack[ed] a substantial nexus with New York" where only allegation of domestic conduct was that "because [certain] payments were made in U.S. dollars, they must have gone through New York banks") (internal quotation marks omitted).

("LCB"), violated the law of nations by facilitating wire transfers for a foreign terrorist organization. 834 F.3d at 217. The wire transfers were processed in the United States by a third party, American Express Bank, Ltd. ("AmEx"), which provided correspondent banking services for LCB. Although the case was dismissed on the ground that there is no corporate liability under the ATS, the Second Circuit noted, in *dictum*, that the presumption against extraterritoriality would have been displaced because "LCB requested that its correspondent bank in New York carry out the wire transfers." *Id.* at 219.

As an initial matter, the *Licci dictum* is distinguishable. The Second Circuit there noted that LCB selected a New York-based account to process the particular wire transfers at issue and engaged in "financing arrangements conducted exclusively through a New York bank account." *Id.* (quoting *Mastafa*, 770 F.3d at 191).[14] In contrast, the "financing arrangements" in this case were conducted exclusively outside the United States, and only the clearing of those payments occurred in this country. Whereas *Licci* could be limited to its special facts, Petitioner's claims here would displace the presumption for *all* international wholesale transactions that in any way involve U.S. dollars.

Moreover, the *dictum* in *Licci* cannot be reconciled with this Court's precedent. The Second Circuit previously affirmed the dismissal of all claims against AmEx, the entity that allegedly processed the wire

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[14] The Second Circuit's *dictum* in *Mastafa*, also relied upon by Petitioners, *see* Pet. Reply at 7, is distinguishable for the same reason.

transfers in the United States. *Licci* v. *Lebanese Canadian Bank, SAL*, 672 F.3d 155, 158 (2d Cir. 2012). Following well-established New York law, the Second Circuit held that AmEx could not be negligent because "banks do not owe non-customers a duty to protect them from the intentional torts committed by the banks' customers." *Id.* at 157 (internal quotation marks and alterations omitted). Because AmEx's conduct in New York was not even *negligent*, it strains credulity to suggest that the same conduct could violate *the law of nations* and thus give rise to liability under the ATS. Without any conduct in the United States that violated the law of nations, the plaintiffs' ATS claims in *Licci* should fail as improperly extraterritorial. *See RJR Nabisco*, 136 S. Ct. at 2101; *Balintulo*, 727 F.3d at 191.

D. Expanding the scope of the ATS to allow suits based on routine clearing operations in the United States would expose internationally active banks to supervening judicial forms of *de facto* regulation.

In deciding whether to expand the scope of the ATS and allow suits based on routine clearing operations in the United States, it should be highly relevant that an extensive and well-developed federal regulatory regime already exists that governs such conduct. The Treasury Department's OFAC maintains a list of specially designated nationals (the "SDN List"), *i.e.*, the individuals and entities with which banks operating in the U.S. are generally prohibited from dealing. *See* OFAC, *Specially Designated Nationals List (SDN)*, available at https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx (last

visited Aug. 27, 2017). That list, which is updated almost daily, reflects the federal government's judgment on which foreign individuals and entities should be excluded from the U.S. banking system. The list includes the groups that the United States government has designated as foreign terrorists.

The banking industry has adopted measures to ensure compliance with OFAC regulations, including the development of special software to interdict funds transfers with SDNs. In the context of payments clearing, interdiction software—variations of which have been adopted by every CHIPS clearing bank—filters payment orders through a sophisticated algorithm that compares the order to the OFAC SDN list. *See* R. Richard Newcombe, *Targeted Financial Sanctions: The U.S. Model*, in *Smart Sanctions: Targeting Economic Statecraft* 41, 58-59 (David Cortright & George A. Lopez eds., 2002). That review of payments occurs in real time, permitting clearing banks immediately to alert the relevant authorities when a payment matches an individual or entity on the SDN list.

In addition, the anti-money laundering provisions of the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*, and their implementing regulations provide a framework for regulating the conduct of foreign banks' dollar-clearing branches in the United States. U.S. branches of foreign banks are required to report as suspicious any fund transfers that "ha[ve] no business or apparent lawful purpose or [are] not the sort in which the particular customer would normally be expected to engage." 31 C.F.R. § 1020.320(a)(2)(iii). Foreign banks' U.S. branches also are required to establish and maintain, in connection with their correspondent banking operations, due diligence programs designed

to enable compliance with this suspicious activity reporting requirement. *See* 31 C.F.R § 1010.610(a).

In short, foreign banks' clearing operations in this country are already subject to an extensive regulatory framework. There is thus no need to expand the reach of the ATS, contrary to principles of extraterritorial application, so that it applies based solely on domestic clearing operations. Nor is there any basis to suggest that Congress intended the ATS to serve as a supplemental form of banking regulation. Petitioners' approach apparently would require banks to determine whether millions of transactions, even if in full compliance with existing laws and regulations, nevertheless may have some link to foreign terrorist activity. If banks are to be subject to that sort of Herculean—and quite likely Sisyphean—task, it should be only as a result of a clear directive from Congress. *See Sosa*, 542 U.S. at 727 ("[T]his Court has repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.").

Amici for Petitioners contend that using the ATS as a means of "enforcement in the financial sector . . . would function well in a cohesive and multi-modal framework to fight terrorist financing." Financial Regulation Scholars and Former Government Officials *Amicus* Br. 17. Whether or not that is true, it is for Congress, and not the courts, to decide. *See Cardona*, 760 F.3d at 1191-92 (11th Cir. 2014) ("The noble goals expressed in our dissenting colleague's observation should perhaps guide the foreign policy of the United States, but that is not for us to say. Certainly, noble goals cannot expand the jurisdiction of the court granted by statute."). Indeed, as *amici* note, Congress has taken express action to provide a

remedy for "[a]ny national of the United States injured . . . by reason of an act of international terrorism." The Antiterrorism Act ("ATA"), 18 U.S.C. § 2333.[15] The lack of any similarly clear legislation for foreign nationals counsels caution, not judicial innovation. *See* Resp Br. 32 n.6.

Amici also warn that precluding entirely foreign ATS lawsuits would "carve clearing out of anti-terrorist financing policy." *Id.* at 22. To the contrary, allowing such lawsuits would impose two separate, overlapping and potentially conflicting regulatory regimes: one clearly defined set of rules imposed by Congress and implemented by expert regulators, and another undefined set of rules enforced by private plaintiffs and courts after the fact. By layering additional obligations on top of those already imposed by Congress and federal regulators on foreign banks' dollar-clearing activities in the United States, Petitioners' approach would potentially impose massive liability on any internationally-active financial institution for conducting routine transactions not prohibited by the relevant regulatory authorities. There is no federal interest in that type of sweeping and uncertain *ex post facto* regulatory regime under the ATS. *Cf. El-Shifa Pharm. Indus. Co.* v. *United States*, 607 F.3d 836, 855 (D.C. Cir. 2010) ("If the plaintiffs were correct, the federal courts presumably would be flooded with ATS claims . . . . Plaintiffs provide no persuasive reason for

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[15] Unlike the ATS, the ATA has been interpreted to provide "extraterritorial jurisdiction over terrorist acts abroad against United States Nationals." *In re Sept. 11 Litig.*, 751 F.3d 86, 93 (2d Cir. 2014) (quoting H.R. 2222, 102d Cong. (1992)).

the federal judiciary to embark on such a novel and far-reaching endeavor in the absence of congressional direction.").

E. Projecting U.S. law abroad would unnecessarily conflict with foreign banking laws and regulations.

As explained above, if clearing operations in the United States were the sort of domestic conduct that by themselves could trigger application of the ATS, the result would be unconstrained litigation against international financial institutions, based on all manner of foreign events with no substantial connection to the United States. It is not difficult to foresee how that would strain the United States' relations with foreign nations. In this very case, the Kingdom of Jordan—an ally of the United States in the war on terror—has described the present litigation as "a grave affront to Jordan's sovereignty." C.A. Hashemite Kingdom of Jordan *Amicus* Br. at 6; *see also* U.S. *Amicus* Br. at 30-33 (describing "considerable" "adverse foreign-policy consequences" of allowing present suit to continue).[16]

Beyond this particular case, other countries have set their own standards for governing the conduct of financial institutions within their borders. *See, e.g.*, Resp. Br. 6 (describing Jordan's comprehensive regulatory scheme prohibiting money laundering and

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[16] Belgium, Germany and France each have human rights statutes comparable to the ATS, but those statutes require the executive to screen a lawsuit before it can proceed, ensuring consistency with the state's foreign policy. *See* Vivian Grosswald Curran & David Sloss, *Reviving Human Rights Litigation After Kiobel*, 107 AM. J. INT'L L. 858, 859-62 (2013).

terrorist financing). Laws governing financial institutions and banking activities are a particularly intricate framework, and the blunt insertion of U.S. law threatens to upset the balance crafted by other sovereign states. *See Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 77-78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (listing recent objections to extraterritorial applications of ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and United Kingdom).[17] That type of "international discord" is precisely what the presumption against extraterritorial application of U.S. law is meant to prevent. *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). Running the risk of interference with other sovereigns' regulatory regimes is particularly unnecessary in this context—*i.e.*, the provision of ordinary banking services that have no more than an incidental connection to the United States.

To be clear, this case is not about *whether* Petitioners should have their day in court, but simply *where*. Here, Petitioners do not deny that they could have pursued their claims in Israel, where they reside and were injured. *See* Resp. Br. 54-55. Instead, their acknowledged reason for suing in the United States was the lure of punitive damages that are rare in Israeli (and most foreign) courts. J.A. 415-416. That is no reason to upend this Court's precedent on the

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[17] More broadly, foreign countries have frequently lodged objections to extraterritorial application of U.S. law where recovery in U.S. courts would dwarf those available in those other countries. *See RJR Nabisco*, 136 S. Ct. at 2107 n.9 (listing objections in antitrust context).

presumption against extraterritoriality. Federal courts should not create jurisdiction in the United States to hear claims that have no meaningful nexus here, especially not in an effort to accommodate plaintiffs who have not even attempted to seek redress available to them under their home legal systems.

CONCLUSION

For the foregoing reasons, clearing foreign dollar payments through the United States cannot serve as the basis for an action under the ATS. The judgment of the court of appeals therefore should be affirmed.

Respectfully submitted.

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AUGUST 28, 2017